

**Before the  
Federal Communications Commission  
Washington, D.C. 20554**

|   |   |            |
|---|---|------------|
| In the Matter of                            | ) |            |
|   | ) |            |
| Comcast Cable Communications, LLC           | ) | CSR 7477-E |
|   | ) |            |
| Petition for Determination of Effective     | ) |            |
| Competition in Tuscaloosa, AL (CUID AL0042) | ) |            |

**MEMORANDUM OPINION AND ORDER**

**Adopted: March 17, 2011**

**Released: March 23, 2011**

By the Senior Deputy Chief, Policy Division, Media Bureau:

**I. INTRODUCTION AND BACKGROUND**

1. Comcast Cable Communications, LLC (“Comcast”), has filed with the Commission a petition pursuant to Sections 76.7, 76.905(b)(2) and 76.907 of the Commission’s rules for a determination that it is subject to effective competition in Tuscaloosa, Alabama. Comcast alleges that its cable system serving Tuscaloosa is subject to effective competition pursuant to Section 623(l)(1)(B) of the Communications Act of 1934, as amended (“Communications Act”),<sup>1</sup> and the Commission’s implementing rules,<sup>2</sup> and is therefore exempt from cable rate regulation there because of the competing service provided by two direct broadcast satellite (“DBS”) providers, DIRECTV, Inc. (“DIRECTV”), and DISH Network (“DISH”). The City of Tuscaloosa (the “City”) filed an opposition to the petition;<sup>3</sup> Comcast filed a Reply.<sup>4</sup>

2. In the absence of a demonstration to the contrary, cable systems are presumed not to be subject to effective competition,<sup>5</sup> as that term is defined by Section 623(l) of the Communications Act and Section 76.905 of the Commission’s rules.<sup>6</sup> The cable operator bears the burden of rebutting the presumption that effective competition does not exist with evidence that effective competition is present within the relevant franchise area.<sup>7</sup> For the reasons set forth below, we grant the petition based on our finding that Comcast is subject to effective competition in Tuscaloosa.

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<sup>1</sup> See 47 U.S.C. § 543(l)(1)(B).

<sup>2</sup> 47 C.F.R. § 76.905(b)(2).

<sup>3</sup> Comments and Opposition to Petition by Franchising Authority, City of Tuscaloosa, Alabama (“Opposition”). The City states that it does not regulate Comcast’s rates, but may wish to. Opposition at 2 n.1. Accordingly, Comcast is seeking to prevent the regulation of its basic service rates under current conditions, not to end it.

<sup>4</sup> Reply to Opposition (“Reply”).

<sup>5</sup> 47 C.F.R. § 76.906.

<sup>6</sup> See 47 U.S.C. § 543(l)(1); 47 C.F.R. § 76.905(b).

<sup>7</sup> See 47 C.F.R. §§ 76.906-76.907(b).

## II. DISCUSSION

3. Section 623(l)(1)(B) of the Communications Act provides that a cable operator is subject to effective competition if the franchise area is (a) served by at least two unaffiliated multi-channel video programming distributors (“MVPDs”), each of which offers comparable video programming to at least 50 percent of the households in the franchise area; and (b) the number of households subscribing to programming services offered by MVPDs other than the largest MVPD exceeds 15 percent of the households in the franchise area.<sup>8</sup> This test is referred to as the “competing provider” test.

### A. The First Part

4. The first part of this test has several elements: the franchise area must be served by at least two unaffiliated MVPDs who offer comparable programming to at least 50 percent of the households in the franchise area.<sup>9</sup> Comcast asserts that Tuscaloosa is served by both DBS providers, DIRECTV and DISH, and that these two MVPD providers are unaffiliated with Comcast or with each other. A franchise area is considered served by an MVPD with an “offer” of service if that MVPD’s service is both technically and actually available in the franchise area. DBS service is presumed to be technically available due to its nationwide satellite footprint, and presumed to be actually available if households in the franchise area are made “reasonably aware” of the service’s availability.<sup>10</sup> The Commission has held that a party may use evidence of subscription rates in the franchise area (the second part of the competing provider test discussed below) coupled with the ubiquity of DBS services to show that consumers are “reasonably aware” of the availability of DBS service.<sup>11</sup> The comparable programming element is met if a competing MVPD provider offers at least 12 channels of video programming, including at least one channel of nonbroadcast service programming<sup>12</sup> and is supported in this petition with copies of channel lineups for both DIRECTV and DISH.<sup>13</sup> Comcast’s asserts that both DIRECTV and DISH offer service to at least 50 percent of the households in Tuscaloosa because of their national satellite footprint.<sup>14</sup>

#### 1. Reasonable Awareness of DBS Service

5. The only assertion by Comcast that the City disputes is that households in Tuscaloosa are “reasonably aware” of DBS service. The requirement that Comcast show reasonable awareness originated in the Commission’s *1993 Rate Order*,<sup>15</sup> where the Commission adopted the general presumption that cable systems are not subject to effective competition.<sup>16</sup> For a cable operator to prevent rate regulation by showing that it is subject to competing provider effective competition, Section

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<sup>8</sup> 47 U.S.C. § 543(l)(1)(B); *see also* 47 C.F.R. § 76.905(b)(2).

<sup>9</sup> 47 C.F.R. § 76.905(b)(2)(i).

<sup>10</sup> *See* Petition at 2-3.

<sup>11</sup> *Mediacom Illinois LLC*, 21 FCC Rcd 1175, 1176, ¶ 3 (2006).

<sup>12</sup> *See* 47 C.F.R. § 76.905(g). *See also* Petition at 4.

<sup>13</sup> *See* Petition at Exh. 1.

<sup>14</sup> *See* Petition at 2.

<sup>15</sup> *Implementation of Section of the Cable Television Consumer Protection & Competition Act of 1992: Rate Regulation*, 8 FCC Rcd 5631, 5656, ¶ 29 (1993) (“1993 Rate Order”), *on reconsideration*, 9 FCC Rcd 4316 (1994), *reversed in part on other grounds*, *Time Warner Entertainment Co., L.P. v. FCC*, 56 F.3d 151 (D.C. Cir. 1995), *cert. denied*, 516 U.S. 1112 (1996).

<sup>16</sup> *1993 Rate Order*, 8 FCC Rcd at 5669-70, ¶ 42.

632(l)(1)(B)(i) requires that a competing provider “offer” service in a community.<sup>17</sup> The *1993 Rate Order* interpreted the “offer” element of the competing provider test to require the cable operator show, among other things, that the competing provider’s service was “actually available” in the area in question. The *1993 Rate Order* further spelled out that for actual availability to exist in an area, “potential subscribers in the franchise area must reasonably be aware that the services of the [competing provider] can be purchased by them.”<sup>18</sup> These requirements are embodied in several Commission rules: the presumption of no effective competition,<sup>19</sup> the cable operator’s general burden of proof,<sup>20</sup> and the “reasonably aware” element of the cable operator’s burden.<sup>21</sup>

6. The common practice in competing provider effective competition cases for many years was for petitioning cable operators to establish reasonable awareness of DBS in part by submitting copies of advertisements for DBS in print media<sup>22</sup> and direct mail sent to the community at issue.<sup>23</sup> After numerous decisions based on such evidence, in 2005 the Commission held that reasonable awareness of DBS could be found based on its nationwide success (noted in periodic Commission reports<sup>24</sup>) and on evidence that, in the community in question, DBS had achieved subscribership of over 15 percent.<sup>25</sup> In the petition in this proceeding, Comcast’s evidence of reasonable awareness of DBS in Tuscaloosa is of this latter kind – data about DBS’s nationwide success and market-specific numerical evidence of DBS subscribership in Tuscaloosa.<sup>26</sup>

7. The City does not deny that Tuscaloosa residents are reasonably aware of DBS. Rather, the City argues that when the Commission allowed reasonable awareness to be established “based solely on general national market conditions,”<sup>27</sup> it nullified its rule requiring that cable operators have the burden of proving reasonable awareness (and effective competition in general) in each case. This, the City argues, is impermissible nullification of a rule by adjudication.<sup>28</sup>

8. The City’s argument is based on a fundamental and incorrect assumption, namely that the Commission has dispensed with requiring market-specific evidence of awareness of DBS services. In fact, showing local awareness as the Commission has allowed since 2005 does require local evidence – specifically, numerical evidence of DBS subscribership in excess of 15 percent in the community in question.<sup>29</sup> Comcast submitted exactly such evidence in its Petition.<sup>30</sup> Moreover, and in the alternative,

<sup>17</sup> See 47 U.S.C. § 543(l)(1)(B)(i).

<sup>18</sup> *1993 Rate Order*, 8 FCC Rcd at 5656, ¶ 29 (bracketed words added).

<sup>19</sup> 47 C.F.R. § 76.906.

<sup>20</sup> 47 C.F.R. § 76.907(b).

<sup>21</sup> 47 C.F.R. § 905(e)(2).

<sup>22</sup> See, e.g., *Charter Commun. Inc.*, 19 FCC Rcd 6878, 6880, ¶ 6 (2004); *MediaOne of Georgia, Inc.*, 12 FCC Rcd 19406, 19409, ¶ 5 (1997); *Daniels Cablevision, Inc.*, 11 FCC Rcd 11858, 11860, ¶ 4 (1996).

<sup>23</sup> See, e.g., *Charter Commun.*, 21 FCC Rcd 3400, 3401-02, ¶¶ 4-6 (2006); *Falcon Community Cable, Inc.*, 17 FCC Rcd 22162, 22163, ¶ 4 (2002); *Daniels Cablevision, Inc.*, 11 FCC Rcd at 11860, ¶ 4.

<sup>24</sup> See, e.g., *Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, 24 FCC Rcd 542, 684 (2009).

<sup>25</sup> *Adelphia Commun.*, 20 FCC Rcd 7503, 7504, ¶ 3 (2005); see also *Mediacom Illinois LLC*, 21 FCC Rcd at 1176, ¶ 3; *Bright House Networks*, 22 FCC Rcd 4390, 4392, ¶ 6 (2007).

<sup>26</sup> Petition at 3.

<sup>27</sup> Opposition at 5.

<sup>28</sup> *Id.* at 4-8.

<sup>29</sup> See authorities cited *supra* note 25.

Comcast's Reply includes local media evidence – ten advertisements for DBS service in The Tuscaloosa News, six pieces of direct mail promoting DBS and addressed to Tuscaloosa addresses, and listings for DBS sellers in local telephone directories.<sup>31</sup> Therefore, neither the Commission's recent practice nor the record herein dispenses with market-specific evidence of reasonable awareness or relieves a cable operator of the burden of proof that our rules place on it. The record herein contains plentiful Community-specific evidence showing that potential subscribers in Tuscaloosa are reasonably aware that they may purchase DBS service. Accordingly, we find that the first part of the competing provider test is satisfied.

## **B. The Second Part**

9. The second part of the competing provider test requires that the number of households subscribing to MVPDs, other than the largest MVPD, exceeds 15 percent of the households in a franchise area. Comcast asserts that it is the largest MVPD in Tuscaloosa.<sup>32</sup> The second part of the competing provider test thus required Comcast to calculate a ratio, the numerator of which was the number of DBS subscribers in Tuscaloosa and the denominator of which was the number of households there.

10. Comcast began to determine the numerator by purchasing a subscriber tracking report from the Satellite Broadcasting and Communications Association ("SBCA") that identified the number of DBS subscribers in the Tuscaloosa area on a five-digit zip code basis.<sup>33</sup> Each of the five-digit zip codes for which SBCA sent Comcast a DBS subscriber number was a "partial zip code," partly inside Tuscaloosa and partly outside it. Comcast needed to allocate the DBS subscriber number for each partial zip code between those who were inside Tuscaloosa and those who were outside it. Comcast obtained, from Media Business Corporation ("MBC"), an allocation percentage for each partial zip code.<sup>34</sup> Comcast then applied each allocation factor to the number of DBS subscribers in the corresponding partial zip code and summed the resulting DBS subscriber numbers, producing its estimate of DBS subscribers in Tuscaloosa (the numerator of the ratio). For the number of households in Tuscaloosa (the denominator of the ratio), Comcast used the 2000 Census count of households there.<sup>35</sup> These numbers, if accepted, show that DBS subscribership in Tuscaloosa is in excess of 15 percent and satisfies the second part of the competing provider test.

### **1. MBC's Allocation Factors**

11. The City objects to one part of Comcast's calculation, namely MBC's allocation factors for the partial zip codes. According to the City, MBC assumes that households are as likely to subscribe to DBS inside Tuscaloosa, where cable service and DBS are available, and outside Tuscaloosa, where only DBS is available. The City objects that this assumption is illogical and overstates the number of DBS subscribers in Tuscaloosa, leading to an excessive estimate of DBS subscribership there.<sup>36</sup>

12. The City does not offer any evidence showing what it assumes, namely that cable service exists only in Tuscaloosa and not in the surrounding areas. This is a significant omission given the City's

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(...continued from previous page)

<sup>30</sup> Petition at Exh. 5.

<sup>31</sup> Reply at Exh. 1.

<sup>32</sup> See Petition at 4.

<sup>33</sup> *Id.* at Exh. 4.

<sup>34</sup> Petition at 5-7 & Exh. 3.

<sup>35</sup> *Id.* at Exh. 6.

<sup>36</sup> Opposition at 12-15.

undoubted familiarity with Tuscaloosa and its surroundings. Nor did the City purchase an SBCA report dividing Tuscaloosa into “Zip+4s” or nine-digit zip codes, which might have documented its speculation about DBS subscribership. Comcast, on the contrary, provided a sworn declaration that the cable operator “Charter . . . serves substantial unincorporated areas immediately surrounding . . . Tuscaloosa.”<sup>37</sup> The City’s objections to Comcast’s evidence are therefore not only vague and unsubstantiated, but contradicted by all available, credible evidence. The record before us leaves us with no reason to reject MBC’s allocation formulas, which we have accepted in many previous decisions,<sup>38</sup> or the rest of Comcast’s estimate of DBS subscribership in Tuscaloosa.

13. We find that Comcast has demonstrated that the number of households subscribing to programming services offered by MVPDs, other than the largest MVPD, exceeds 15 percent of the households in Tuscaloosa. Therefore, as displayed in Attachment A hereto, the second part of the competing provider test is satisfied in Tuscaloosa, Alabama, and Comcast has shown that it is subject to effective competition there.

### III. ORDERING CLAUSES

14. Accordingly, **IT IS ORDERED** that the petition for a determination of effective competition filed in the captioned proceeding by Comcast Cable Communications, LLC, **IS GRANTED**.

15. This action is taken pursuant to delegated authority pursuant to Section 0.283 of the Commission’s rules.<sup>39</sup>

FEDERAL COMMUNICATIONS COMMISSION

Steven A. Broeckert  
Senior Deputy Chief, Policy Division, Media Bureau

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<sup>37</sup> Reply at 5 & Exh. 2 (Declaration of Daniel Holt, Comcast of Tuscaloosa Construction Coordinator) at ¶ 3 (“The local Charter cable system serves a substantial area in Tuscaloosa County surrounding the City of Tuscaloosa”).

<sup>38</sup> See, e.g., *Comcast Cable Commun., LLC*, Memorandum Opinion & Order DA 11-430 at ¶ 6 (rel. March 7, 2011), available at 2011 WL 773455; *Subsidiaries of Cablevision Systems Corp.*, 23 FCC Rcd 14141, 14146-47, ¶ 20 (2008), *application for review pending*; *Adelphia Cable Commun.*, 22 FCC Rcd 4458, 4461, ¶ 10 (2007).

<sup>39</sup> 47 C.F.R. § 0.283.

## ATTACHMENT A

## CSR 7477-E

## COMMUNITY SERVED BY COMCAST CABLE COMMUNICATIONS, LLC

| Community       | CUID    | CPR*   | 2000 Census Households | Estimated DBS Subscribers |
|-----------------|---------|--------|------------------------|---------------------------|
| Tuscaloosa City | AL 0042 | 15.44% | 31381                  | 4847                      |

\*CPR = Percent of competitive DBS subscription rate.